

CHAPTER 6

HEARINGS

I. INTRODUCTION

In individual complaints of discrimination, an agency must, pursuant to section 1614.108(f), notify the complainant of his/her right to request, within 30 days of receipt of the investigative file, a hearing on the complaint by an EEOC administrative judge. Hearings are governed by section 1614.109. In the case of accepted class complaints, an EEOC administrative judge will, pursuant to section 1614.204(h), conduct a hearing on the complaint in accordance with section 1614.109(a) through (f).

Generally, an administrative judge will conduct a hearing on the merits of a complaint unless: (1) the parties mutually resolve the complaint and the hearing request is withdrawn; (2) the hearing request is otherwise voluntarily withdrawn; (3) the complaint is remanded for failure to prosecute; or (4) the administrative judge determines that some or all material facts are not in genuine dispute and issues an order limiting the scope of the hearing, or if the administrative judge decides to issue findings and conclusions without a hearing pursuant to section 1614.109(e)(2) or (3).

The hearing is an adjudicatory proceeding which completes the investigation of a complaint by ensuring that the parties have a fair and reasonable opportunity to explain and supplement the record and to examine and cross-examine witnesses. An administrative judge from the EEOC adjudicates claims of discrimination and issues findings and conclusions.

It is the obligation of the parties to obtain and enter into the record any evidence necessary to such an adjudication. The Commission will be less inclined to remand for further supplementation of the record where parties had the notice and opportunity to develop the record below.

II. THE ROLES OF THE AGENCY AND THE ADMINISTRATIVE JUDGE**A. Agency Responsibility at the Hearing Stage****1. Room and Notice to Witnesses**

The agency is responsible for arranging for an appropriate size room in which to hold the hearing and for ensuring that all approved witnesses who are Federal employees are notified of the date and time of the hearing and the approximate time that their presence will be required.

2. Hearings are closed to the public.

Hearings are a part of the investigative process and access to the hearing room and the record of the hearing shall be restricted in accordance with the Commission's regulations and policies and the discretion of the administrative judge.

3. Verbatim Hearing Transcripts and Court Reporters

The agency shall arrange and pay for a verbatim transcript of the hearing proceedings pursuant to section 1614.109(f). All documents submitted to, and accepted by, the administrative judge shall become a part of the record. The administrative judge shall issue findings and conclusions on the merits of the complaint, including appropriate relief where discrimination is found. Agencies should instruct reporters with whom they contract to submit bills to the agency, but to submit the original and all copies (usually two) of the transcript to the Commission's administrative judge, who can provide verification of transcript receipt and the number of pages in the transcript. Contracts with court reporting firms must require delivery of the transcript to the administrative judge within 21 calendar days or less after the close of the hearing. If the administrative judge identifies a problem with timely delivery of the transcript or any other difficulty, (s)he should contact the agency directly to resolve the matter. The agency shall take any steps necessary to ensure that the transcript is provided as expeditiously as

possible. Absent a specific memorandum of understanding with the EEOC, the agency may not use agency employees to transcribe the proceedings.

Although Federal agencies are required to comply with their internal contracting procedures in contracting for reporters, EEOC district offices can, upon request, furnish to Federal agencies the names and addresses of responsible reporters in the geographic area where the hearing is to be held. As a matter of information, the General Services Administration also maintains a list of court reporters available to agencies in the Federal Supply Schedule.

4. The Site of the Hearing

Attachment A to Chapter 7 (Class Complaints) of the management directive is a list of the addresses of the EEOC district and field offices and their geographic jurisdictions. Agencies' requests for a hearing must be sent to the district office having jurisdiction of the agency facility where the complaint arose. Should the agency's organizational component where the complaint arose not fall within one of the geographical jurisdictions shown, the agency should contact the following office for guidance:

Equal Employment Opportunity Commission
Complaints Adjudication Division
Federal Sector Programs
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Telephone: (202) 663-4517

Upon receipt of a hearing request, the administrative judge assigned to hear the complaint will determine the site of the hearing. Within his/her discretion, the administrative judge is authorized to conduct the hearing in the EEOC district office, in an EEOC area or local office, at the agency's organizational component where the complaint arose or at such other location as he/she may determine appropriate.

In determining the hearing site, the administrative judge may consider factors such as the location of the parties, the location of EEOC district, area and local offices, the number and location of witnesses, the location of records, travel distances for the administrative judge, the parties and witnesses, travel costs, the availability of sources of transportation and other factors as may be appropriate.

If the administrative judge sets a hearing site which is outside the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable travel expenses of complainants, their authorized representatives, agency representatives, and all witnesses approved by the administrative judge, except that an agency does not have the authority to pay the travel expenses of complainant's witnesses who are not Federal employees.

Should an agency desire that a hearing be held within the jurisdictional area of another EEOC district office, it must submit a request, in writing, to the administrative judge in the appropriate EEOC district or field office having jurisdiction over the agency's organizational component where the complaint arose. In its request, the agency must set out, in detail, its reasons and justification for the requested change. The administrative judge will rule on the request only after the directors of the concerned EEOC district offices have conferred on the matter.

If the agency's request for a change in location from the jurisdiction of one EEOC district office to another is approved, and if the hearing site, as determined by the administrative judge, is outside of the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable travel expenses associated with the change. This includes the travel expenses of complainants, their authorized representatives, agency representatives, and all witnesses approved by the administrative judge, except that an agency does not have the authority to pay the travel expenses of complainants' witnesses who are not Federal employees.

The agency's obligation is limited to those costs which are legally payable in advance by the agency. *See* Decisions of the Comptroller General, *Matter of: Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing*, File: B-202845, 61 Comp. Gen. 654 (1982). *See also* *Matter of: John Booth--Travel Expenses of Witness -- Agency Responsible*, File: B-235845, 69 Comp. Gen. 269 (1990).

B. The Role of the Administrative Judge

1. Administrative Judge's Review

When a case is referred for a hearing, an administrative judge shall, within 10 days, review the file, determine whether additional documentation is necessary and make requests of the appropriate party for the production of any additional documentation.

If after reviewing the file, the administrative judge determines that the investigation is inadequate and incomplete due to the agency's failure to complete the investigation within the time limits set forth in section 1614.108(e), and the agency has not cooperated in the discovery process as required by section 1614.109(d)(3), the administrative judge may take the following actions:

- a. Subject the agency to adverse inference findings in favor of the complainant;
- b. Consider the matters to which the requested information or testimony pertains to be favorable to the complainant;
- c. Exclude other evidence offered by the agency;
- d. Permit the complainant to obtain a summary disposition in his/her favor on some or all of the issues without a hearing; or

- e. Take other action deemed appropriate, including, but not limited to, requiring the agency to pay any costs incurred by the complainant in taking depositions or in any other form of discovery.

2. Data Requests

If the agency is requested to produce additional documents, it shall furnish a copy of those documents to the complainant at the time they are submitted to the administrative judge. If the complainant is requested to submit additional documents, the administrative judge shall make the documents available to the agency for reproduction.

3. Administrative Judge's Authority

The administrative judge shall have the authority to do the following:

- a. Administer oaths.
- b. Regulate the conduct of hearings.
- c. Limit the number of witnesses so as to exclude irrelevant and repetitious evidence.
- d. Order discovery or the production of documents and witnesses.
- e. Direct supplemental investigations when discovery would be inadequate in developing the record.
- f. Exclude any person from the hearing who is disruptive.
- g. Issue findings and conclusions without a hearing if there are no material facts in issue.
- h. Limit the hearing to the issues in dispute.

- i. Impose appropriate sanctions on parties who fail to comply with discovery orders.

The administrative judge has the authority to impose sanctions on a party if (s)he fails to comply without good cause with rulings on requests for information, documents, or admissions, where the information is solely in the control of that party. Similarly, if a party fails to provide an adequate explanation for the failure to respond fully and in a timely manner to a request and the information is solely in the control of that party, the administrative judge may impose sanctions. These sanctions include, but are not limited to, the authority to:

- (1) draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;
- (2) consider the matters to which the requested information pertains to be established in favor of the opposing party;
- (3) exclude other evidence offered by the party failing to produce the requested information;
- (4) enter a decision fully or partially in favor of the opposing party; and,
- (5) take such other actions as appropriate.

4. Findings and Conclusions Without a Hearing

- a. On Motion of a Party

A party who believes that some or all material facts are not in genuine dispute may file a statement in support of this contention with the administrative judge at least fifteen (15) days prior to the hearing, or at such earlier time as required

by the administrative judge. The administrative judge shall, in the acknowledgement order, specify a date for filing such a statement and provide for extending that time in certain circumstances. A copy of any such statement shall be served on the opposing party.

The opposing party will have fifteen (15) days from the receipt of the statement in which to file any opposition to the statement.

After considering the request and the opposing submission, if any, the administrative judge may deny the request, order that discovery be permitted on the facts involved, limit the hearing to the issues remaining in dispute (if any), issue findings and conclusions without a hearing, or make such other rulings as are appropriate.

b. On Administrative Judge's Determination

If the administrative judge determines, in the absence of a request from either party, that some or all of the facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond within fifteen (15) days, issue an order limiting the scope of the hearing or issue findings and conclusions without conducting a hearing.

5. Transmittal of the Findings and Conclusions

At the conclusion of the hearing stage and within 180 days of a request for a hearing, the administrative judge shall send the following items to the parties by certified mail.

a. The findings and conclusions.

- b. Copies of the entire record, including the transcript.

The administrative judge may, when necessary, release the transcript prior to the issuance of the findings and conclusions, e.g., when the transcript is needed to prepare a post-hearing brief.

The administrative judge may issue findings of fact and conclusions of law from the bench after the conclusion of the hearing, in lieu of issuing written findings and conclusions.

III. DISCOVERY

A. Introduction

1. General

The purpose of discovery is to enable a party to obtain relevant information for preparation of the party's case. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. In cases where the investigative record is complete, the administrative judge may disapprove discovery requests.

A reasonable amount of official time shall be allowed to prepare requests for discovery and to respond to discovery requests.

2. Avoidance of Delay

The discovery instructions which follow are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of intervention by the Commission's administrative judge. The parties are further expected to use discovery judiciously for its intended purpose only.

B. Right to Seek Discovery**1. Notice of Right to Seek Discovery**

The administrative judge will notify the parties of the right to obtain discovery.

- a. The administrative judge will send an acknowledgement order to the parties within ten (10) calendar days after the Commission's receipt of the hearing request. The acknowledgement order will notify the parties of the right to seek discovery. In order to conduct discovery, a party must file, within ten (10) calendar days of the receipt of the acknowledgement order, either a stipulation of the parties permitting discovery or a motion to conduct discovery with the administrative judge.
- b. It is the Commission's policy that the parties are entitled, pursuant to section 1614.109(b), to the reasonable development of evidence on matters relevant to the issues raised in the complaint.

2. Discovery is Designed to Supplement the Record

It is anticipated that discovery will ordinarily involve supplementing the existing record. There may be situations in which the record does not have to be supplemented.

3. Discovery Time Frames Will Be Strictly Regarded

Discovery must be completed within ninety (90) calendar days from the Commission's receipt of a request for hearing. Parties' requests to the administrative judge to extend discovery beyond this time limit ordinarily will not be granted.

C. Methods of Discovery**1. Evidence may be developed using a variety of methods including****a. Interrogatories**

Absent specific authorization from the administrative judge, a party may propound no more than one (1) set of interrogatories. A set of interrogatories will not contain more than thirty (30) questions and the questions will not have subparts.

b. Depositions

Generally the party requesting depositions will pay for them. A failure to appear at a properly scheduled deposition may result in the non-appearing party bearing the cost of the missed session. For purposes of this section, any employee or former employee of the agency currently employed by the Federal government is a party. Agencies must make such persons available for depositions and such depositions shall be taken on official time. The agency may be liable for costs incurred if such persons are not made available on the clock for depositions or other discovery or if such persons fail to appear.

c. Stipulations

Stipulations are strongly encouraged.

d. Requests for Admissions

A request for admissions will contain no more than thirty (30) requests for the admission of facts.

e. Requests for the Production of Documents

Requests must be specific, identifying the document or types of documents requested.

2. Where possible, more informal methods of discovery should be employed.

- a. The parties may request that a witness be made available for questioning without the production of a transcript or tape recording where the purpose is to discover the availability of other evidence, either documentary or testimonial.
- b. The parties may agree to the questioning of witnesses using a tape recording device, provided that any such tape will not be accepted in evidence without authentication. Such authentication can be presumed where the opposing party is provided a copy of the tape at the close of the discovery session and it is identical to the tape proffered in evidence.

D. Discovery Procedures

1. Commencing Discovery

a. Written agreements

Where the parties have agreed in writing concerning the methods and scope of discovery, they must, within ten (10) calendar days of receipt of the administrative judge's notice of right to seek discovery, furnish a copy of the agreement to the administrative judge and begin the exchange of discovery requests.

b. Requests for authorization to commence

If the parties have not agreed in writing concerning the method and scope of discovery, a party must, within ten (10) calendar days of receipt of the administrative judge's notice of right to seek discovery, submit to the administrative judge a request for authorization to commence discovery.

The request must state the method(s) and scope of discovery requested and its relevance to the issue(s) in the complaint. Within ten (10) calendar days of receipt of a request, the administrative judge will issue an authorization to begin discovery if the request is approved in whole or in part.

c. Exchange of requests

Upon receipt of the administrative judge's authorization to begin discovery, the parties must, within ten (10) calendar days, exchange requests for discovery. The parties must cooperate with each other in honoring requests for relevant, non-repetitive documentary and testimonial evidence. Discovery disputes will be resolved by the administrative judge.

(1) Where to address discovery

Requests for discovery should be addressed to the agency representative, complainant or complainant's representative of record, and not to the administrative judge. Requests for discovery addressed to the administrative judge will be returned by the administrative judge to the party submitting the discovery request with instructions to serve the request on the agency representative, the complainant or the complainant's representative of record, as appropriate. Where a party inappropriately submits a discovery request to the administrative judge, the required time frame for submitting the request to the appropriate party will not stop running.

(2) Criteria for requests

The request should be: (1) as specific as possible, (2) reasonably calculated to discover non-repetitive, material evidence and, if not self-evident, the request must indicate the materiality of the documentary or testimonial evidence sought and the manner in which

the information sought will elucidate the accepted issues.

2. Informal Discovery

Informal discovery includes unrecorded meetings and conference calls designed to exchange information. In many instances discovery should proceed on an informal basis. For example, if a primary purpose of discovery is to determine the scope and content of a material witness' testimony, it may be sufficient that there be a meeting scheduled with the witness and that the discovery be conducted on an informal basis. If that method proves unsatisfactory, a more formal method of discovery may be used.

3. Response to Discovery Request

The opposing party/representative must respond to the request for discovery within fifteen (15) calendar days from the date of receipt of the request. A response means:

a. Compliance with the request;

Voluntary cooperation with discovery requests is encouraged;

b. Written opposition to the request;

Such opposition shall set forth a basis for finding that the request is irrelevant, overburdensome, repetitious, or privileged;

c. Written agreement or stipulation obviating the request;

Stipulations of fact are favored as a means of resolving discovery issues;

d. Request for extension of time;

Request for extension of time to comply or to produce a written agreement shall not exceed fifteen (15) calendar days.

4. Failure to Respond to Request for Discovery

- a. Failure to respond to a request for discovery within fifteen (15) calendar days of receipt of the request, shall form the basis for a motion to compel discovery.
- b. A motion to compel must be filed within five (5) calendar days after the expiration date for responding to a request for discovery.
- c. A motion to compel compliance with a request for discovery must be addressed to the administrative judge and certify that a copy was served on the opposing party.
- d. Any statement in opposition to the motion must be filed within ten (10) calendar days of service of the motion and must certify that a copy was mailed to the moving party.

5. The Administrative Judges Will Rule Expeditiously on Matters of Discovery

Within ten (10) calendar days following the filing of an opposition, if any, to the motion to compel discovery, the administrative judge will rule on the request for discovery. In the alternative, the administrative judge may, in the interest of expediting the hearing, order that the document(s), witness(es) or other evidence at issue be produced at the hearing.

6. Administrative Judge's Orders to Comply

- a. In considering a motion to compel compliance, the administrative judge will consider whether the following factors apply:
 - (1) the discovery is calculated to produce or lead to the production of material evidence that is not repetitious of facts or documents already in the complaint file,
 - (2) the discovery does not concern privileged or restricted information, and

(3) the discovery is not overly burdensome.

- b. Where a motion to compel discovery is approved, in whole or in part, the administrative judge shall issue a written order to comply with the request. The parties shall have fifteen (15) calendar days to comply with a discovery order.

7. Failure to Respond or Comply With Administrative Judge's Order May Result in an Adverse Inference.

A failure to respond or failure to follow an order to comply with a request for discovery, may result in an inference that the evidence not produced was contrary to the non-complying party's interest.

E. Failure to Request Discovery Does Not Imply Waiver of Requests for Documents and Witnesses at Hearing.

The parties will be provided the opportunity to make requests for documents and witnesses at the hearing regardless of whether the discovery process is invoked. In the course of setting a matter for hearing the administrative judge will ask the parties to submit a list of documents and proposed witnesses which they believe to be necessary to the presentation of their case and which should be produced at the hearing. The request must be supported by a statement demonstrating the materiality and the non-repetitive content of the witnesses' testimony and/or the documents.

F. Cost of Discovery

The parties shall initially bear their own costs with regard to discovery, unless the administrative judge, as a result of a discovery order issued pursuant to section 1614.109(d)(3)(v), requires the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation timely as required by section 1614.108(e) or has failed to investigate the matter adequately pursuant to Chapter 5 of this Directive.